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Supreme Court, U.S.
FILED

No. 95-826 JUL 10 1995

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

SAM S. JENKINS SR.,

Petitioner

vs.

STATE OF NEW MEXICO SECURITIES DIVISION

Respondent

SUPPLEMENTARY APPENDIX TO WRIT TO THE UNITED STATES COURT OF APPEALS FOR THE NEW MEXICO COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

SAM S. JENKINS, SR.,
PRO SE APPELLANT
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ALBUQUERQUE, N.M. 87154
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November 14, 1995

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12 pp

IN THE COURT OF APPEALS OF THE

STATE OF NEW MEXICO

STATE OF NEW MEXICO SECURITIES DIVISION,

Plaintiff-Appellee

No. 15,836

vs.

FILED
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COURT OF APPEALS
STATE OF NEW MEXICO
P.R. WALLACE, CLERK

SAM S. JENKINS, SR.,

Defendant-Appellant

ADMINISTRATIVE APPEAL FROM THE
NEW MEXICO SECURITIES DIVISION
Nancy M. Smith, Director

Michael J. Vargon
Santa Fe, New Mexico — Deputy Director New Mexico Securities Division

Sam S. Jenkins, Sr.
Albuquerque, New Mexico — Pro Se

MEMORANDUM OPINION

ALARID, Judge.

Respondent Sam S. Jenkins, Sr. appeals the

Securities Division order dated August 9, 1994. This Court's calendar notice proposed to affirm the order of the Securities Division. Respondent filed an untimely memorandum in opposition to this Court's proposed disposition, due December 13, 1994, but filed on December 20, 1994. Even if we consider the arguments made by Respondent in the untimely memorandum, however, we are unpersuaded by them for the following reasons.

In the calendar notice, we stated that judicial review of decisions by agencies is based on the whole record. Cibola Energy Corp. v. Roselli, 105 N.M. 774, 776, 737, P.2d 555, 557 (Ct. App. 1987). In order to determine whether the Securities Division erred in adopting the recommendations of the hearing officer, this Court independently examines the administrative record to determine whether that decision was arbitrary and capricious, was supported by substantial evidence, and was

within the scope of the administrative body's authority. Anaya v. New Mexico State Personnel Bd., 107 N.M. 622, 625, 762, P.2d 909, 912 (Ct. App.)cert. denied, 107 N.M. 673, 763, P.2d 689 (1988). This Court must determine whether, on balance, the record as a whole contains substantial evidence to support the Security Division's findings. Id.; see also In re Mountain Bell, 109 N.M. 504, 505, 787, P.2d 423, 424 (1990). and In re Apodaca, 108 N.M. 175, 177, 769, P.2d 88, 90 (1989). We must also determine that the findings made support the conclusions of law and that the conclusions of law are sound.

In Adopting the recommendations of the hearing officer, the Securities Division concluded that: (1) the shares in All States Publishing Inc. offered by Respondent were "securities" within the meaning of NMSA 1978, Section 58-13B-2(V) (Repl. Pamp, 1991) of the Securities Act of 1986 (the "Act"); (2) Respondent violated

NMSA 1978, Section 58-13B-20 (Repl. Pamp. 1991) of the Act by offering to sell securities which were neither registered nor exempt under the Act; (3) Respondent violated Section NMSA 1978, 58-13B-3(A) (Repl. Pamp. 1991) of the Act by offering to sell securities as an unlicensed sales representative; (4) the Division did not sustain its burden of proof in showing that Respondent's conduct violated NMSA 1978, Section 58-13B-5 (Repl. Pamp. 1991) of the Act by acting as an unlicensed investment advisor; and (5) given these violations, it was in the public interest and consistent with the purposes of the Act to enter a final order. In the Final Order, the Securities Division ordered the Respondent to: (1) cease and desist from soliciting, offering, and selling securities of any kind in New Mexico without first complying with all requirements of the Act; and (2) within thirty days of the receipt of the Order pay a total civil penalty in the amount of $2,000.00

pursuant to NMSA 1978, Section 58-13B-37 (Repl. Pamp. 1991) of the Act.

After reviewing the memorandum in opposition, we continue to believe that except for the legal issues discussed below, Respondent's "Points" on appeal appear to be matters relating to the conduct of witnesses and attorneys, the bases of facts, the credibility and truthfulness of the witnesses involved, and documents presented at the Securities Division hearing--all matters for the fact finder rather than this Court. See Herman v. Miner's Hosp., 111 N.M.550, 552, 807, P.2d 734, 736, (1991)("to determine whether a challenged finding is supported by substantial evidence, we have always given the deference to the fact finder, even when we apply... the whole record review"). Moreover, as we stated in the calendar notice, the existence of conflicting or contradictory evidence obligates the fact finder to resolve the conflicts and contradictions. See

Mascarenas v. Jaramillo, 111 N.M. 410, 412, 806, P.2d 59, 61, (1991) (only the trier of fact may weigh the testimony, determine the credibility of witnesses, reconcile inconsistent or contradictory statements of a witness, and ascertain the truth).

After reviewing the Memorandum, and because the Securities Division began its investigation of Respondent prior to learning about the content of the book Respondent was writing, we continue to believe that Respondent has provided this court with essentially conclusory allegations on appeal of "unsupported evidence"; "fraudulent targeting" and "harassment" in another case resulting in a "conflict of interest" in this case; "mis-statements and deception"; "erroneous" discussion of facts and "mis-statements"; and "political persecution". See Thornton v. Gamble, 101, N.M. 764, 769, 688, P.2d 1268, 1273, (Ct.App. 1984)(counsel must set out all relevant facts in the docketing

statement).

Accordingly, we affirm the Securities Division August 9, 1994 order as based on substantial evidence on the record as a whole with regard to the points raised by Respondent relating to the credibility and truthfulness of the witnesses, integrity of the hearing officer,and findings of fact made by the Securities Division.

On the legal issues, we hold that the Securities Division applied the law correctly. First, we affirm the Securities Division's determination that the shares offered by the Respondent in All States Publishing, Inc. are "securities." See NMSA 1978, Section 58-13B-2(V) (Repl.Pamp 1991; see also State v. Sheets, 94 N.M. 356, 360-361, 610 P.2d 760,764-765 (Ct.App.), cert denied, 94 N.M. 675, 615, P.2d 992 (1980).

Second, we are not convinced on the record before us after review of the relevant statues, New Mexico case law and the out-of-state case

law cited by Respondent in the memorandum that Respondent's offering of securites is exempt from the registration requirements set forth in Section 58-13B-20 under NMSA 1978, Section 58-13B-27(A) (Repl. Pamp. 1991)(exemption for and isolated non-issuer transaction). Respondent acted as and unlicensed sales representative of the issuing company by offering shares of stock as investment opportunities, hence as securities, to the public pursuant to a newspaper advertisement,information sheet certificate of shares, and purchase agreement, for the benefit of himself/his company, the issuer. Whether any sales actually took place is irrelevant to the determination under Section 58-13B-20, since that statute forbids unregistered nonexempt offerings or sales of securities. Moreover, under the current New Mexico law, the isolated non-issuer transaction exemption is designed to cover commercial transactions such as the one time sale of two

businesses. White v. Solomon 105 N.M. 366, 368, 732, P.2d 1389, 1391 (Ct. App. 1986), cert. denied 105 N.M. 290, 731 P.2d 1334 (1987).

Finally, Respondent has not given this Court any facts raised below or legal authorities which support his assertion that he was exempt from the sales representative licensing requirements of Section 58-13B-?(A), in a situation where the Act places the burden upon the person claiming an exemption See NMSA 1978, Section 58-13B 28(B) (Repl.Pamp. 1991);see also Golden Cone Concepts, Inc. v Villa Linda Mall, 113 N.M. 9, 12, 820, P.2d 1323, 1326 (1991) ("when a party is challenging a legal conclusion, the standard for review is whether the law correctly was applied to the facts, viewing them in a manner most favorable to the prevailing party, indulging all reasonable inferences in support of the court's decision, and disregarding all inferences or evidence to the contrary").

The hearing officer's findings of fact and conclusions of law appear to be based on

substantial evidence on the record as a whole. The findings support the conclusions and the conclusions appear to be sound. Accordingly, we affirm the Securities Division's Findings of Fact, Conclusions of Law, and Final Order entered on August 9, 1994.

IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

WE CONCUR:

RUDY S. APODACA, Chief Judge

HARRIS L HARTZ, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Monday, April 10, 1995

NO. 22,780

STATE OF NEW MEXICO SECURITIES DIVISION,

Plaintiff-Respondent

vs.

SAM S. JENKINS, SR.,

Defendant-Petitioner,

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is denied.

IT IS FURTHER ORDERED that the Record in Cause No. **15836** is returned to the Clerk of the Court of Appeals.

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT
BY_____
Chief Deputy